

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FACEBOOK, INC., CASE NO. 5:08-CV-03468 JF

Plaintiff,

v.

STUDIVZ LTD.,
HOLTZBRINK NETWORKS GMBH,
HOLTZBRINK VENTURES GMBH and
DOES 1-25,

Defendants.

The above-styled cause came on for hearing on
December 16, 2008 at 10:31 a.m. before The Honorable
Howard R. Lloyd, United States Magistrate Judge,
Courtroom 2, Fifth Floor.

APPEARANCES:

ON BEHALF OF PLAINTIFF:

ORRICK, HERRINGTON & SUTCLIFFE, LLP
By Annette L. Hurst
1000 Marsh Road
Menlo Park, CA 94043

ON BEHALF OF DEFENDANTS:

GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER, LLP
By Stephen S. Smith
1900 Avenue of the Stars
Suite 2100
Los Angeles, CA 90067

1 THE CLERK: Let's see, Facebook and StudiVZ.
2 I probably didn't pronounce that right. Facebook
3 against a bunch of German entities.

4 MS. HURST: Good morning, Your Honor, Annette
5 Hurst from Orrick for plaintiff Facebook.

6 MR. SMITH: Good morning, Your Honor, Stephen
7 Smith, Greenberg Glusker on behalf of StudiVZ,
8 Holtzbrinck Ventures and Holtzbrinck Networks.

9 THE COURT: Hello, counsel. The defendants
10 move for a protective order. They want to stay
11 discovery that's unrelated to personal jurisdiction
12 issues raised in their motions to dismiss until those
13 motions are resolved, and they want to preclude
14 Facebook from using in the German action any discovery
15 obtained in the instant lawsuit. And we'll talk about
16 the first one first.

17 As I understand it, the defendants agree that
18 if, in the course of investigating personal
19 jurisdiction, that discovery would also go to the
20 merits, that that wouldn't be a problem.

21 MR. SMITH: That's correct, Your Honor.

22 THE COURT: Okay. So, your objection is to
23 discovery which is solely, you say, directed at merits
24 at this time?

25 MR. SMITH: That's correct, Your Honor.

1 THE COURT: And that would apply to the
2 depositions, too. In other words, you're not opposed
3 to a deposition -- and I know there were several sought
4 -- that are on personal jurisdiction issues, at this
5 time?

6 MR. SMITH: That's correct, Your Honor, two
7 of them are currently scheduled to occur in January.

8 THE COURT: And do you think that -- let me
9 ask it this way: Do you agree that you should be
10 limited to discovery which deals with personal
11 jurisdiction, even if it happens to also overlap into
12 merits? Or do you say "I should be able to do anything
13 I want, within reason?"

14 MS. HURST: Your Honor, we certainly disagree
15 that there must be some prima facie standard met on
16 personal jurisdiction in order to conduct discovery.
17 That collapses the merit standard for evaluating a
18 personal jurisdiction motion with the current inquiry,
19 and that is improper.

20 That said, as a practical matter, we have not
21 conducted discovery that is solely related to the
22 merits. For example, no damages discovery has been
23 propounded, Your Honor, and so we have taken a
24 practical approach, but there is a significant
25 difference between the parties in terms of framing the

1 issues for personal jurisdiction. And we don't want to
2 get dragged into some quagmire where we contend it's
3 related to personal jurisdiction and they don't simply
4 because it's not covered by one of the declarations
5 that they filed in support of their motion.

6 THE COURT: Am I being dragged into the
7 quagmire now, being asked to rule on your discovery
8 requests and to parse those out which deal with
9 personal jurisdiction and those which deal only with
10 merits?

11 MS. HURST: Your Honor, in fact, the motion
12 has not presented that issue to the court properly. The
13 proposed order asks simply for a blanket scope that,
14 unless it's a dispute of material issue raised in their
15 motion to dismiss, we can't take discovery on it.

16 THE COURT: Oh, I'm not going to sign that.

17 MS. HURST: So the proper procedure -- Your
18 Honor, no protective order is necessary here. Quite
19 frankly, we haven't conducted any discovery that is
20 solely related to the merits, such as damages
21 discovery. We have engaged in further meet and confer
22 about specific discovery requests for several weeks
23 since the time this motion has been filed. We have
24 largely been able to work out every issue, and there
25 remain, I believe, Your Honor, very few issues that

1 would come back before this court in the context of
2 further dispute about a burden versus relevance
3 analysis, whether it be for personal jurisdiction or
4 merits purposes.

5 Respectfully, Your Honor, this motion is
6 unnecessary, but it's also misguided in terms of its
7 substantive standards.

8 MR. SMITH: Can I respond to that?

9 THE COURT: Well, yeah, but just a minute.
10 Now, you're not telling me you've worked this out and
11 the time that I've spent on this is wasted, are you?

12 MS. HURST: Your Honor, it was our view as
13 set forth in the opposition that this motion was
14 premature and unnecessary.

15 THE COURT: No, I'm talking about you said in
16 the weeks since it was briefed and -- filed and briefed
17 that you've continued to talk, and there was some
18 allusion there to where "we've got it mostly worked
19 out."

20 MS. HURST: Well certainly, Your Honor, we
21 continue to meet and confer regarding the specific
22 discovery that was served in the context of the
23 responses that were received from the defendants,
24 whether they were sufficient or not, what documents
25 would be produced, what interrogatories would be

1 answered, and what witnesses would be produced for
2 deposition, which is part of the reason why, Your
3 Honor, in our opposition we took the view there had
4 been inadequate meet and confer with respect to this
5 motion and that it should be denied on that ground, as
6 well.

7 THE COURT: Well, there's like 30 requests
8 for document production. And I understood that I and
9 my staff was going to go through these and decide
10 whether they were exclusively merits-based discovery or
11 whether they had a tinge of personal jurisdiction.
12 Shouldn't they have done that?

13 MR. SMITH: I think we're in agreement with
14 that, Your Honor, that's not what the motion for
15 protective order is directed at. I would disagree with
16 two other things Ms. Hurst said, with all due respect.
17 One, there has been a tremendous amount of meet and
18 confer about this. We've been meeting and conferring
19 about it for months.

20 The responses to this discovery were not even
21 due until after the motion for protective order was
22 filed, and that goes to the other thing I'd like to
23 say. I asked counsel for Facebook, Ms. Hurst's
24 colleague, Warrington Parker, repeatedly prior to
25 filing the motion, "are you saying that you're going to

1 insist on the right to take merits-based discovery now,
2 and if so, I'm going to have to file a motion for
3 protective order. If you would just agree not to do
4 that, I won't have to file a motion for protective
5 order." He refused to agree to that, that's the only
6 reason the motion for protective order was filed.

7 THE COURT: So, what are you looking for?
8 Now I'm really confused.

9 MR. SMITH: We're just looking for an order
10 that they not be entitled to engage in merits-based --
11 solely merits-based discovery.

12 THE COURT: But you two won't agree on what
13 that means.

14 MR. SMITH: Well, Your Honor, after they
15 filed their opposition, I called Ms. Hurst and said "is
16 it even necessary to have a fight about this anymore?"
17 I said "why don't we just have an agreement," I did use
18 the word "stipulation," I believe, but "an agreement
19 that you won't do merits-based discovery -- solely
20 merits-based discovery while the motions to dismiss are
21 pending?" And she said she was afraid that if I got
22 that kind of stipulation and order, I would "lord it"
23 over her head. So that's why this is still on the
24 calendar.

25 THE COURT: So, with reference to the

1 document and production requests, and I think there are
2 30 of them, have you responded to them by now?

3 MR. SMITH: Yes, Your Honor. And then
4 afterwards, we have had as Ms. Hurst said, some I think
5 productive meet and confer. I don't think that we're
6 in total agreement, but there has been a substantial
7 amount, I think, of progress made.

8 THE COURT: And so the time that we spent
9 looking through them and trying to assess whether it
10 was related to personal jurisdiction or simply based on
11 merit, is time that was not well spent? I'm trying to
12 understand.

13 MR. SMITH: Yes, Your Honor, but we didn't
14 ask for that and we have been -- in fact, at the time
15 we filed our motion, there hadn't even been a response
16 yet to that discovery. The motion is not directed to
17 that discovery, it's directed towards their insistence,
18 it's not just in the discovery, it's in the Rule 26(f)
19 statement, the case management conference statement.

20 THE COURT: But when you say "it's not
21 directed to that discovery," then what is it directed
22 to?

23 MR. SMITH: It's directed to having a
24 protective order to prevent certain discovery from
25 occurring. Normally, if you're going to just object to

1 discovery that is propounded, you object and the other
2 side needs to compel. I was seeking a motion for
3 protective order because Mr. Parker would not agree not
4 to serve merits-based discovery while the motions to
5 dismiss were pending.

6 THE COURT: Okay, well, that's interesting.
7 Ms. Hurst, what do you think I'm being asked to decide?

8 MS. HURST: Your Honor, respectfully, I
9 always look at the proposed order to really try to
10 ascertain where the rubber meets the road, and I
11 understood the motion to be some kind of a request for
12 a blanket line drawing about what discovery could be
13 conducted and what discovery not.

14 I did not understand it to be requesting the
15 court to go through on a item-by-item basis, and in
16 fact, that was one of the reasons that we objected to
17 the motion, because we thought such a procedure would
18 be premature in that they had not yet responded and we
19 had not met and conferred about specific requests.

20 THE COURT: Am I going to get a motion now to
21 compel further responses to the RFPs or the
22 interrogatories now that you've gotten responses?

23 MS. HURST: Your Honor, I can't answer that
24 question today because we don't have the supplemental
25 responses and the document production. It is possible.

1 There is at least one issue that we have identified
2 that we are unlikely to come to an agreement on that
3 may come back to the court in the future, but it may be
4 unnecessary for us to bring it back to the court if,
5 after the production of documents, the interrogatory
6 responses, and the depositions we ascertain that we
7 have a sufficient amount of information to proceed in
8 opposing the motion.

9 MR. SMITH: And I think Ms. Hurst will agree
10 with me here that even if we have that disagreement or
11 others, it's going to be much narrower than the entire
12 universe of the discovery that was propounded, because
13 on much of that we have come to an agreement.

14 THE COURT: Well, if I were to sign the
15 proposed order, which I think you said would preclude
16 merits-based discovery at this point, --

17 MR. SMITH: Solely merits-based, Judge.

18 THE COURT: -- aren't you two going to
19 disagree over what merit-based discovery is?

20 MS. HURST: Yes, Your Honor, which is why I
21 was unwilling to agree to a stipulation on this. But
22 frankly, Your Honor, the process of give and take
23 during meet and confer is a much better way to resolve
24 that dispute than some kind of blanket advance
25 pronouncement.

1 THE COURT: I'll go for that.

2 MS. HURST: We can work this out, Your Honor.

3 MR. SMITH: I don't even have a problem with
4 that, Your Honor. I only filed the motion for
5 protective order because I felt like I was forced to. I
6 was told by Mr. Parker that I was going to be -- that
7 they were insisting on the right to conduct, right then
8 and there, merits-based discovery.

9 THE COURT: You know, you always have the
10 right if they submit a discovery request that is
11 merits-based, to bring a motion to -- so that you don't
12 have to respond to it.

13 MR. SMITH: And in retrospect, that's what I
14 should have done.

15 THE COURT: Yeah, because now we're -- this
16 is very -- this is up in the clouds. This is like
17 asking for an advisory opinion on something which isn't
18 a real dispute at the moment, apparently.

19 MR. SMITH: I thought it was a real dispute.
20 I had three different conversations with Mr. Parker
21 about this.

22 THE COURT: Okay.

23 MR. SMITH: So, I apologize if I brought the
24 motion prematurely. I expected to be getting it any
25 moment, merits-based discovery, while the motions to

1 dismiss were pending.

2 THE COURT: And then I'm going to get a
3 motion.

4 MR. SMITH: I think it will be a much smaller
5 one.

6 THE COURT: Well, that's nice, but we've
7 already dealt with this big one. Are you withdrawing
8 this motion?

9 MR. SMITH: That part of it.

10 THE COURT: Fine, then the record will
11 reflect that the defendants have withdrawn the portion
12 of the motion dealing with what the court interpreted
13 to be a dispute over merits-based versus personal
14 jurisdiction discovery.

15 All right, as to the other part of the motion
16 which deals with the defendants' assertion that
17 Facebook should be precluded from using any discovery
18 it obtains here in the US of A in the German action,
19 the German action is an action brought by these
20 defendants in this court against Facebook in Germany,
21 apparently intending to obtain a judgment in Germany
22 saying that whatever they did was perfectly okay.

23 MR. SMITH: Just for the record, Your Honor,
24 there are now two actions in Germany. Facebook filed a
25 separate action after this motion was filed. But

1 otherwise, that is correct.

2 THE COURT: Okay. Now, you want me to order
3 Facebook that they cannot use any discovery they obtain
4 in the US of A in Germany?

5 MR. SMITH: That's correct, Your Honor.

6 THE COURT: And why would I be doing that?
7 Wouldn't that be the German court's job to determine
8 what discovery it is willing to consider?

9 MR. SMITH: I think that may be correct if we
10 didn't have the issue of the defendants even being in
11 this case to begin with, Your Honor. It is our
12 position that the case shouldn't have been filed to
13 begin with, which is why the motions to dismiss are
14 currently pending in front of the District Court.

15 It seems -- maybe I'm missing something, but
16 it seems completely unfair to have had a case that
17 potentially never should have been filed in the first
18 place used to obtain discovery in Germany, especially
19 when all of the information is found in Germany. That
20 information should be discovered for purposes of being
21 used in the German action pursuant to the German
22 procedure for that.

23 THE COURT: Well, there's two possibilities.
24 One is, it just happens to be a US action and there is
25 a German action, and I don't know of any rule that

1 would say that the US court should tell the litigant it
2 cannot use any discovery it acquired in the US of A in
3 Germany. That's up to the German court.

4 The other possibility, and there is a case or
5 two cited about that, is if the lawsuit is brought in
6 the US of A solely for the purpose of getting discovery
7 which they otherwise couldn't get in Germany. But I
8 don't know that I have any evidence of that.

9 MR. SMITH: No, and I think in all fairness,
10 I would concede I don't think Facebook brought the case
11 solely to get discovery in America for use in Germany,
12 and I don't think we argued that.

13 THE COURT: No, I don't think you did either.

14 MR. SMITH: Yeah, but my point is: If it
15 turns out -- there are motions to dismiss currently
16 pending. If it turns out that those motions should be
17 granted, and I know we're not here to argue that today,
18 but if it turns out that those motions should be
19 granted and the case never should have been filed
20 against the defendants, and we have had one defendant
21 who has been dismissed already, so it's -- and the
22 motions are well founded. I don't think anyone is
23 arguing they are intolerable motions. Then the process
24 in the United States shouldn't have happened at all.

25 And the rules in Germany are quite different.

1 You can get discovery, but it's much more limited. It
2 usually has to take place in front of the court at the
3 time it is being offered or obtained, and it just
4 doesn't seem right, and I think the 1782 cases that we
5 cited indicate that discovery in that context is not
6 appropriate to be used in a foreign action.

7 Now, I do recognize, and we make this point
8 in our papers, that this is not directly on a 1782
9 situation.

10 THE COURT: I don't think 1782 has anything
11 to do with this situation.

12 MR. SMITH: I think it's analogous, but I
13 don't think it's directly on point because in 1782 you
14 don't have a separate already pending civil action in
15 the United States. You actually go to the United
16 States for discovery.

17 THE COURT: So you want me to order that if
18 the motions to dismiss get granted and the case is
19 dismissed, then they can't use the discovery in Germany
20 or they can't try to; but if it doesn't get dismissed,
21 then they can try to?

22 MR. SMITH: That's not how we phrased it, but
23 I would be okay with that because that's my concern
24 about it is -- I agree with you, we shouldn't be going
25 down this road to begin with if we shouldn't have been

1 in the case to begin with. That's the argument. If,
2 after we are not dismissed, if we are not dismissed,
3 they want to argue to the German court, we should be
4 allowed to use this, then I don't feel like I need an
5 order from Your Honor that I go to Germany and say "no,
6 Germany, you can't consider that because it has already
7 been decided in the United States." That's not what
8 the purpose of this motion is for.

9 THE COURT: I guess I'm not entirely clear on
10 why, if the case is dismissed, and that would somehow
11 invalidate discovery that has been obtained or immunize
12 it from potential use in Germany.

13 MR. SMITH: Well, what it means is the
14 defendant shouldn't have been sued here and so no
15 discovery should take place.

16 THE COURT: But so what, the discovery was
17 obtained and while there was, at that point, a viable
18 action.

19 MR. SMITH: I guess the issue I'm having,
20 Your Honor, is the word "viable action." If defendants
21 shouldn't have been sued or continuing to be sued prior
22 to their motion to dismiss being heard, is this viable,
23 then yes. But if you have a valid motion to dismiss for
24 lack of personal jurisdiction, I wouldn't call that
25 action viable.

1 THE COURT: Okay, what do you have to say,
2 Ms. Hurst, briefly?

3 MS. HURST: Your Honor, the German court is
4 the place to determine whether this evidence would be
5 admissible or not. It is inefficient, and frankly,
6 unjust. It does not lie in the mouth of the defendants
7 to assert that there is relevant evidence establishing
8 their liability that we shouldn't be able to go and use
9 elsewhere subject to local rules.

10 It's just -- it's an unseemly contention,
11 Your Honor. And to the extent that they are arguing --

12 THE COURT: Unseemly contention, I like that.
13 I'll have to remember that.

14 MS. HURST: To the extent that they are
15 arguing, Your Honor, that because the discovery would
16 be unavailable in German court, you know, and they're
17 using this kind of back door approach with the 1782
18 cases on this, Your Honor, I would like to point out
19 that that implication has been expressly rejected by
20 the United States Supreme Court under 1782 in the Intel
21 v. AMD case, 542 U.S. 241.

22 In that case, the court said "we're not going
23 to import a categorical foreign discovery rule into
24 1782." And so, again, saying "it's a matter of local
25 law," and that's the way it should be here, as well,

1 Your Honor.

2 THE COURT: Okay, the matter is submitted.

3 MS. HURST: Yes, thank you.

4 MR. SMITH: Can I briefly respond to the
5 unseemliness just because I felt like that wasn't fair?
6 There are rules in the United States about privilege,
7 for example.

8 THE COURT: There was a bit of hyperbole
9 there.

10 MR. SMITH: This isn't -- we're not trying to
11 do anything unseemly. If the United States has a rule,
12 for example, about attorney-client privilege, that
13 sometimes will cover relevant information. I don't
14 know what Germany's rule about attorney-client
15 privilege is, I'm just saying that the German rule
16 ought to apply to the stuff that's going to be used
17 there.

18 Otherwise, submit Your Honor.

19 THE COURT: All right, thank you, counsel.

20 MS. HURST: Your Honor, I have a proposed
21 form of protective order that allows the use in all
22 pending proceedings between the parties. It has been
23 shared with Mr. Smith in advance of the hearing. It is
24 the same as the stipulated form of order that we
25 previously submitted to the court, with the exception

1 of resolving this issue in the plaintiff's favor. I
2 could hand it up or submit it electronically to the
3 court after the hearing.

4 THE COURT: Is it a stipulated order?

5 MS. HURST: There was a stipulated form of
6 order that we filed to have in place pending resolution
7 of this dispute.

8 THE COURT: Right, I remember that, and we
9 were thinking "well, if we issued an order today, then
10 we wouldn't need that one." But you've withdrawn that
11 part of it.

12 MR. SMITH: No, it's the German issue.

13 THE COURT: The German issue.

14 MS. HURST: On the German issue.

15 MR. SMITH: I agree with Ms. Hurst here. She
16 did give me the language yesterday. Let me see if I
17 can state it, the District Court's form order, which is
18 basically what we've used so far.

19 THE COURT: Right.

20 MR. SMITH: Says you can only use
21 confidential information in this action. If I
22 basically lose the second half of my motion for
23 protective order, --

24 THE COURT: Yeah.

25 MR. SMITH: -- they want to say "expand it so

1 it can be used in this action or other litigation
2 pending between the parties."

3 THE COURT: Suppose it's silent on it. See,
4 I'm inclined, on the second part of your motion, I'm
5 inclined to simply say that I'm not precluding the
6 plaintiff from using it. That's all.

7 MR. SMITH: Right, I think that there is a
8 distinction there, Your Honor, because you don't want
9 to necessarily have an order giving them the right to
10 use it and then you're going to deny my request
11 prohibiting it.

12 THE COURT: Not precluding it.

13 MS. HURST: I think that is what our proposed
14 form of order accomplishes, Your Honor.

15 THE COURT: Good. Well, it doesn't sound
16 like you two have quite worked that out, so I don't
17 want to see it right now.

18 MR. SMITH: I do respectfully disagree with
19 that. I think it makes it sound like in the way, and
20 I'll go back and look at it, but it sounds to me like
21 it says -- gives explicit permission for them to use
22 it.

23 MS. HURST: Well, in accordance with local
24 law, sure, certainly.

25 MR. SMITH: I would rather it be silent.

1 THE COURT: Go work that out, please.

2 MS. HURST: Thank you, Your Honor.

3 MR. SMITH: Thank you, Your Honor.

4 (Hearing adjourned 10:52 a.m.)

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1 STATE OF COLORADO)
2) ss. CERTIFICATE
3 COUNTY OF DENVER)
4

5 I, Christopher Boone, Certified Electronic
6 Court Reporter and Notary Public within and for the
7 State of Colorado, certify that the foregoing is a
8 correct transcription from the digital recording of
9 the proceedings in the above-entitled matter.

10

11 I further certify that I am neither counsel
12 for, related to, nor employed by any of the parties
13 to the action in which this hearing was taken, and
14 further that I am not financially or otherwise
15 interested in the outcome of the action.

16

17 In witness whereof, I have affixed my
18 signature and seal this 11th day of January, 2009.

19

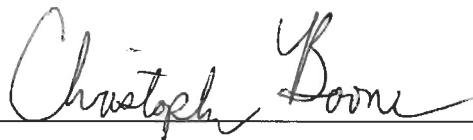
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My commission expires August 16, 2010.

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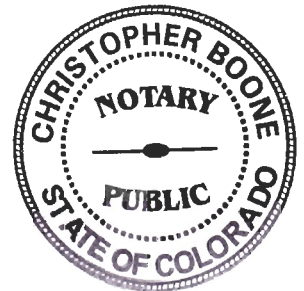


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25

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